Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

LOVIE L. WELLS, JR.,

Petitioner,

v.

LEE COUNTY, a political subdivision of the State of Florida,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the director of a local governmental agency charged with the duty to investigate and pursue unlawful employment practices sufficiently engaged in either or both the opposition to unlawful employment practices or the investigative participation of unlawful employment practices to allow a jury to find him to be engaged in a statutorily protected activity and be afforded the protection against retaliatory discharge under Title VII of The Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-3?

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Lovie L. Wells, Jr., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

Neither the opinion of the court of appeals (Appendix, *infra*, at App. A) nor the opinion of the district court (App. B) is reported.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit ("Court of Appeals") was entered on December 13, 1999. The court of appeals denied a timely petition for rehearing on February 24, 2000 (App. C).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 704(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000 *et seq.*, provides:

> **Sec. 704. (a)** It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor

> organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title. (42 U.S.C. § 2000e-3).

Federal Rule of Civil Procedure 50 provides in pertinent part:

> **(a) Judgment as a Matter of Law.**
>
> **(1)** If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.
>
> **(2)** Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment – and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned:

(A) order a new trial, or

(B) direct entry of judgment as a matter of law.

(c) Granting Renewed Motion for Judgment as a Matter of Law; Conditional Rulings; New Trial Motion.

(1) If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

* * *

STATEMENT OF THE CASE

More than half a year after the jury's verdict, and only days before his death, the Honorable Lee P. Gagliardi, Senior United States District Judge, granted the Rule 50(b) motion of Lee County, Florida, defeating the jury's findings that Lee County, Florida, had discharged Mr. Lovie L. Wells, Jr., in retaliation both for his opposition to unlawful

employment practices and for his assistance and participation in investigations of unlawful employment practices.

Lee County is a political subdivision of Florida and its governing body is its Board of County Commissioners. In 1986, within the course of its responsibilities, the Board established its Division of Equal Opportunity. As a Title VII deferral agency, the Division's tasks included conducting investigations and proceedings relating to charges of unlawful employment practices in both the public and private sectors of Lee County. By 1993, the Division was annually addressing approximately 830 new inquiries and commencing approximately ninety new formal investigations of unlawful employment practices.

In July of 1993, Lee County engaged a new County Manager who thereafter employed a new Assistant County Manager and a new Director of Administrative Services. This became the chain of command over the Division of Equal Opportunity and its director, Mr. Wells. A thirteen-year employee of Lee County, Mr. Wells was the only black employed in any of scores of administrative and management positions in the county government.

Barely a month into the new "administration," his superiors privately directed Mr. Wells to cease his Division's work in equal housing matters. This direction was given without the authority of the Lee County Board and ran contrary to Lee County's obligations under its contract with HUD. After internal comment to his superior, Mr. Wells followed the directive. Taking public criticism for the action, Mr. Wells accepted the criticism without disclosing that his action was taken only at the direction of his superiors.

For the next fifteen months until his November 29, 1994, discharge, Mr. Wells and his Division of Equal Opportunity continued their work relating to unlawful employment practices. During this fifteen month period of time, there was a continuing indirect but systematic attempt to force Mr. Wells to reduce, if not outright cease, the Title VII function of his Division. Only following the failure of Mr. Wells to comply with this force, was he terminated.

The new County Manager admitted that the Lee County Board had not given him any instruction to reduce or eliminate Mr. Wells' investigation of unfair employment practices. Still, as Lee County had conceded as early as its opening statement, the new administration began giving Mr. Wells further additional duties. His workload was being increased by mandates such as demands for the preparation of extensively detailed reports that would then be left unread and for the recruitment of minority applicants for nonexistent administrative positions.[1]

Mr. Wells' new supervisor conceded that more job duties were being placed on Mr. Wells as he chose to stay fully involved with the enforcement area and that with these new, added duties, Mr. Wells "had plenty to do, more than he could probably do in an optimum way." Moreover, the supervisor also admitted that he clearly understood that the suggestions for redirection would have a negative impact on the Division's enforcement function ("... negative or positive, depending on where you wanted to go."). Yet, despite these supervisory suggestions that the new additional work assignments should curtail his enforcement

1. Of note, the Department of Human Resources, not the Division of Equal Opportunity, was the recruitment arm of the Lee County government.

work, Mr. Wells spoke in disagreement and continued to maintain that he could do both. Facing only "suggestions" and not directions (in contrast to the earlier directions regarding equal housing matters), Mr. Wells failed to accept the suggestions and accordingly failed to reduce the enforcement efforts of his Division. To that failure, his supervisor testified:

> . . . if everything had been understood and resolved and everybody was on the same track, there wouldn't have been no termination.

Simply, Mr. Wells refused to take the track which would lead from his Title VII enforcement duties. It was not, however, a matter of his lack of understanding, it was a matter of his commitment to duty. Still, either way, the discharge was retaliatory.

At the conclusion of Mr. Wells' case in chief, Lee County made a Rule 50(a) motion. Recognizing that Mr. Wells claimed his discharge was in retaliation for his protected activity, Lee County based its motion on the singular issue of the causal link between that protected activity and the adverse action: "No link has been shown by the Plaintiff." In its limited argument, Lee County made no attempt to argue that Mr. Wells had failed to introduce evidence of protected activity. The court interrupted Mr. Wells' argument only to deny the motion, expressly stating that there was sufficient evidence requiring jury determination. The trial continued with Lee County further presenting its articulated reasons for the discharge, and Mr. Wells' lengthy presentation of the pretext behind each of these articulated reasons.

Yet, as ultimately viewed by the trial court, Lee County's post trial Rule 50(b) motion now contended that Mr. Wells had failed to present a prima facie case of retaliatory discharge because no evidence of protected activity was adduced at trial. Thus, Lee County was no longer challenging the link, but rather the more basic element of protected activity.

In then granting the Rule 50(b) motion, the court fixed on two points. These points are the basis of our review.

First, the trial court now understood that Mr. Wells had claimed only that his discharge was in retaliation for his complaints regarding alleged violations of anti-discrimination law, that the jury found that Lee County had discharged Mr. Wells solely in retaliation for his opposition to unlawful employment practices, and that Mr. Wells never pursued the theory that his participation in employment discrimination proceedings was a basis for his discharge.

Second, although the court still expressly recognized that it was part of Mr. Wells' job to investigate employment discrimination complaints in Lee County and assist in the enforcement of remedial measures thereto, it nevertheless found that Mr. Wells made no specific objection to any unlawful employment practices of Lee County and that no specific anecdotal evidence was presented as to any investigative participation. It then proceeded to find that without such anecdotal evidence, there was no protected activity and, therefore, logically, there could be no causal link between protected activity and the decision for his discharge.

Even a simple cursory record review, however, is clearly contrary to these two points. While Mr. Wells may not have voiced any specific complaints charging Lee County with having unlawfully discriminated against any of its own employees, by word and deed, Mr. Wells and his Division worked against unlawful employment practices and worked to avoid reducing their efforts against unlawful employment practices.

As to the participation clause, both the allegations of the complaint and the agreed issues of the pretrial stipulation unequivocally establish that Mr. Wells sought relief under the participation clause as well as the opposition clause. Following through with the closing argument, the unopposed jury instructions, the clear discussion during a bench conference during jury deliberations, and the agreed verdict form, the record clearly and unequivocally established that Mr. Wells sought relief under both the opposition and the participation clauses.

Notwithstanding the very nature and performance of Mr. Wells' work, the court found no anecdotal evidence of his engagement in any protected activity. Without seeing any anecdotal trees, the trial court failed to recognize the forest and took from Mr. Wells the protections afforded against retaliatory discharge.

REASONS FOR GRANTING THE WRIT

A solitary natural person stands with a singular simple issue before the Supreme Court of the United States. It is a humbling experience to suggest that the issue in his case is worthy of the Court's time and consideration.

Still, between the time of trial and the entry of the memorandum opinion, the trial court lost sight of the basic underlying point of the action and found that Mr. Wells failed to adduce any evidence that he engaged in protected activity. Title VII protects employees from employer retaliation under two independent components: its opposition clause and its participation clause. There can be no question that Congress acted within its authority in enacting Title VII and that the Act is a remedial one, its remedial river intended to flow over all grounds where employees have been the subject of wrongful action in retaliation either for their opposition to, or their participation in review of, unlawful employment practices.

Without a written appellate opinion to serve as their obituary, the retaliation claims of Mr. Wells were buried by the silent but inevitable conclusion that an opposition clause action requires specific anecdotal evidence of specific complaints in opposition to unlawful employment practices and that a participation clause action requires specific anecdotal evidence of specific participation in individual investigations of purported unlawful employment practices.

This view fails to consider the uncommon nature of Mr. Wells' very employment. While it attempted many articulated reasons for the discharge, Lee County never attempted to suggest that Mr. Wells was anything but conscientious in his efforts for his Division to pursue issues of unlawful employment practices. By being the director of a deferral agency dedicated to enforcement against unlawful employment practices, Mr. Wells was within the protected expression of both the opposition clause and the participation clause when he sought to continue such work and opposed implied orders to reduce such work.

I. THE LEGAL STANDARD.

As noted above, the Act prohibits an employer from retaliating against an employee for the employee's opposition to an employment practice made unlawful under Title VII, or for his participation in any manner in an investigation of an employment practice made unlawful under Title VII. As with most employment discrimination cases, the plaintiff in this case presented circumstantial evidence in support of his claim. Accordingly the burden shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), was used to guide the presentation. This framework requires a plaintiff to establish a prima facie case, which with respect to retaliation encompasses the following well-established components: 1) plaintiff's engaging in statutorily protected expression, 2) plaintiff's suffering an adverse employment action, and 3) demonstrating a causal link between the two. *Taylor v. Runyon*, 175 F.3d 861, 868 (11th Cir. 1999) (citing *Goldsmith v. City of Atmore*, 996 F.2d 1155, 1163 (11th Cir. 1993)).[2] Typically, the defendant must then introduce legitimate non-discriminatory reasons for the adverse employment action, (*Raney v. Vinson Guard Service*, 120 F.3d 1192, 1196 (11th Cir. 1997), (quoting *Hairston v. Gainesville Sun Publishing Co.*, 9 F.3d 913, 919 (11th Cir. 1993)), which the plaintiff must then show are merely pretextual and not the true motivation for the adverse action.

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2. Other circuits use the same formula. *See, e.g., Norville v. Staten Island Univ. Hosp.*, 196 F.3d 89, 1999 WL 996945, at *3 (2d Cir. 1999); *Brennan v. Metropolitan Opera Ass'n*, 192 F.3d 310, 316 (2d Cir. 1999); *Price v. S-B Power Tool*, 75 F.3d 362, 365 (8th Cir. 1996); *Little v. Cox's Supermarkets*, 71 F.3d 637, 642 n.3 (7th Cir. 1995).

Brown v. Brody, 199 F.3d 446, 453 n.5 (D.C. Cir. 1999).

Standard v. A.B.E.L. Services, Inc., 161 F.3d 1318, 1332 (11th Cir. 1998). At trial, Lee County attempted to offer "legitimate non-discriminatory" reasons for Mr. Wells' dismissal, thus arguably dispensing with the requirement of the prima facie case and moving directly to the substantive issue of whether there was a preponderance of evidence from which a reasonable trier of fact could find, more probably than not, that Mr. Wells had been the victim of unlawful retaliation for his opposition to, or participation or assistance in the investigation of, employment discrimination made unlawful under Title VII. *See Wright v. Southland Corp.*, 187 F.3d 1287 (11th Cir. 1999).

Accordingly, the question for review is whether the educational, investigative, administrative, and enforcement powers wielded by Mr. Wells in his capacity of Director of the Division of Equal Opportunity constitute protected expression under Title VII.

A. The Opposition Clause.

Ordinarily, the opposition clause is seen as a whistle blower act. An employee can make out a prima facie case by showing that he reasonably believed that he was opposing a violation of Title VII by his employer. *Rollins v. State of Florida Department of Law Enforcement*, 868 F.2d 397, 400 (11th Cir. 1989); *Little v. United Technologies*, 103 F.3d 956, 960 (11th Cir. 1997). That is, whether the conduct complained of legally constitutes actionable discrimination is immaterial to the question of retaliation. "Retaliation is a separate offense under Title VII; an employee need not prove the underlying claim of discrimination for the retaliation claim to succeed." *Meeks v. Computer Associates, Int'l.*, 15 F.3d 1013, 1021 (11th Cir. 1994); *Tipton v. Canadian*

Imperial Bank of Commerce, 872 F.2d 1491, 1494 (11th Cir. 1989). What is required is a good faith, reasonable belief that the conduct was unlawful.

Yet again, Mr. Wells had a relatively unique job. By the very nature of that job, Mr. Wells opposed unlawful employment practices no less than a police officer opposes criminal activity. The opposition is part and parcel of the job itself.

The words expressly chosen by Congress, "because he has opposed any practice made an unlawful employment practice by this Title," are not so limited as to protect only that employee who has voiced a specific complaint in opposition to his own employer's apparent violation of Title VII. While this would be the ordinary and common situation, it is not the sole and exclusive one affording protection to employees. The clear language of the opposition clause placed Mr. Wells within its protection in so far as the performance of his Title VII duties was, by its very nature, protected expression.

B. The Participation Clause.

Perhaps even clearer is the protection under the participation clause. While the opposition clause may arguably be a limited whistle blower act requiring active opposition and necessitating voiced complaints of alleged violations by the employer, the participation clause differs greatly and its scope is much broader.

> The distinction between participation clause protection and opposition clause protection is significant because the scope of protection is

> different. Activities under the participation clause are essential to " 'the machinery set up by Title VII.' " *Hashimoto v. Dalton*, 118 F.3d 671, 680 (9th Cir. 1997) (quoting *Silver v. KCA, Inc.*, 586 F.2d 138, 141 (9th Cir. 1978), cert. denied, 140 L. Ed. 2d 943, 118 S. Ct. 1803, 1998 WL 245048 (U.S. 1998)). As such, the scope of protection for activity falling under the participation clause is broader than for activity falling under the opposition clause. See *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989).

Laughlin v. Metropolitan Washington Airports Authority, 149 F.3d 253, 259 n.4 (4th Cir. 1998).

The section is straight forward and is expansively written. As explained by the Eleventh Circuit Court of Appeals,

> Congress chose the language "testified" and "participated in any manner" to express its intent about the activity to be protected against retaliation. The word "testified" is not preceded or followed by any restrictive language that limits its reach. As to "participated in any manner," the adjective "any" is not ambiguous; it has a well-established meaning. Earlier this year, the Supreme Court explained, "Read naturally, the word "any" has an expansive meaning, that is, "one or some indiscriminately of whatever kind." *United States v. Gonzales*, 520 U.S. 1, 5, 117 S. Ct. 1032, 1035, 137 L. Ed. 2d 132 (1997) (citation omitted). Here, as in *Gonzales*,

> "Congress did not add any language limiting the breadth of that word," so "any" means all. See *Id.*

Merritt v. Dillard Paper Company, 120 F.3d 1181, 1186 (11th Cir. 1997), *reh'g and suggestion for reh'g en banc denied*, 130 F.3d 446 (11th Cir. 1997). The expanse of protected participation activity has even been held to include participation by its perceived villains as well as its perceived victims. *Id.* (providing protection against retaliation for employee testifying unwillingly and in hostile manner during investigation of co-employee's discrimination suit). Indeed, the courts have long recognized the congressional intent that this protection is to be liberally construed;

> The protective provisions of Title VII are substantially broader than even those included in the Fair Labor Standards Act and the National Labor Relations Act in that, in addition to protecting charges and testimony, Title VII also specifically protects assistance and participation. This indicates the exceptionally broad protection intended for protestors of discriminatory employment practices. The protection of assistance and participation in any manner would be illusory if employer could retaliate against employee for having assisted or participated in a Commission proceeding.

Pettway v. American Cast Iron Pipe Co., 411 F.2d 998, 1006 n.18 (5th Cir. 1969). The purpose of the participation clause has been characterized by the Supreme Court as "[m]aintaining unfettered access to statutory remedial mechanisms." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 117

S. Ct. 843, 848, 136 L. Ed. 2d 808 (1997). Accordingly, a liberal application of the participation clause is necessary to serve statutory intent.

> Activities that constitute participation are outlined in the statute: (1) making a charge; (2) testifying; (3) assisting; or (4) participating in any manner in an investigation, proceeding, or hearing under Title VII. *See* 42 U.S.C.A. § 2000e-3(a). Participatory activities are vigorously protected to ensure employees' continuing access to the EEOC and the enforcement process. *See Vasconcelos v. Meese*, 907 F.2d 111, 113 (9th Cir. 1990) ("The purpose of section 2000e-3's participation clause is to protect the employee who utilizes the tools provided by Congress to protect his rights." (internal quotation marks omitted)).

Laughlin v. Metropolitan Washington Airports Authority, 149 F.3d 253, 259 (4th Cir. 1998). In the instant case, Mr. Wells and his Division actively assisted and participated in investigations under Title VII as an elementary part of his employment duties.

If as recognized in *Merritt*, the courts have no authority to alter statutory language, if the participation clause has no limiting requirement of a good motive or a pure interest, and if the broad protections as afforded by the plain language of the participation clause extend even beyond those who volunteer in the war against discrimination, such broad protections must certainly protect those whose very employment necessitates their participation in that war. In this case, Mr. Wells was in charge of the governmental agency tasked with investigating employment discrimination

complaints and not only participating in, but actively assisting in making known and available, an avenue of redress. When confronted with suggestions to discontinue such enforcement activity, Mr. Wells opposed such direction and attempted to continue with both the new duties assigned his Division and the continuing enforcement duties. In return, Mr. Wells was eventually dismissed from his position.

The participation clause of the anti-retaliation provisions of Title VII cannot be read any way other than to protect a public employee who conscientiously performs his job by assistance and participation in investigations of unlawful employment practices. The protection is there without imposing a new evidentiary burden obligating an enforcement officer to identify a specific individual investigation and to link it to the officer's discharge.

II. SUPREME COURT REVIEW.

But still, why is this such an important question of federal law as should be settled by this Court?

First, a remedial act of Congress properly enacted within its legislative authority should proceed to remedy all situations within its purview. Secondly, laws are largely meaningless without enforcement. While Mr. Wells and other Title VII enforcement officers are far from soldiers in military combat, they are employed with the express job duty of participating in what our courts have referred to as the war against discrimination. To perform that job duty in any meaningful way, such officers not only need but are entitled to protection in the field.

Neither Mr. Wells nor anyone else likewise employed by local, state or federal government could conscientiously pursue his work without provoking reaction from those who would otherwise avoid the mandate of Title VII. Without a clear pronouncement protecting such employees from retaliation, a devastatingly chilling effect would inevitably descend on the Act. In reading the words of Congress, in viewing the words' plain intent, can there be anything more basic or clearer than recognition that the discharge of a civil servant in retaliation for his failure to reduce his Title VII enforcement efforts is an unlawful employment practice?

Simply, no one's career should be at risk for conscientiously working against unlawful employment practices. That basic truth is protected by Title VII and the recognition of that truth is worthy of the time and words of this Supreme Court. We humbly submit that this truth is much larger than the solitary natural person before this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED DECEMBER 13, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-3578

D. C. Docket No. 96-00371-CV-FTM-24

LOVIE L. WELLS, JR.,

Plaintiff-Appellant,

versus

LEE COUNTY, a political subdivision
of the State of Florida,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(December 13, 1999)

Before TJOFLAT and CARNES, Circuit Judges and RONEY, Senior Circuit Judge.

Appendix A

PER CURIAM:

AFFIRMED. *See* 11th Cir. R. 36-1.[1]

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1. 11th Cir. R. 36-1 provides:

> When the court determines that any of the following circumstances exist:
>
> (a) judgment of the district court is based on findings of fact that are not clearly erroneous;
>
> (b) the evidence in support of a jury verdict is sufficient;
>
> (c) the order of an administrative agency is supported by substantial evidence on the record as a whole;
>
> (d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA DATED OCTOBER 1, 1998 AND FILED OCTOBER 5, 1998

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

96-371-CIV-FTM-24D

LOVIE WELLS, JR.,

Plaintiff,

– against –

LEE COUNTY, a political subdivision of the State of Florida,

Defendant.

MEMORANDUM OPINION AND ORDER

GAGLIARDI, Senior D.J.

The prevailing plaintiff in a Title VII action moves for entry of judgment on the jury award (Doc. No. 57), prejudgment interest (Doc. No. 57) and frontpay. (Doc. No. 54). Defendant opposes Plaintiff's request for frontpay and moves the Court to order, pursuant Fed. R. Civ. P. 50(b), judgment as a matter of law in its favor. (Doc. No. 59). In the alternative Defendant requests the Court to order a new trial pursuant to Fed. R. Civ. P. 59 or to remit the jury's award for emotional damages. (Doc. No. 58). For the reasons

set forth below, Defendant's motion for judgment as a matter of law is granted. Defendant's motion for new trial is conditionally granted. Plaintiff's motions for entry of judgment, prejudgment interest and frontpay are denied. Defendant's motion for remittitur is denied as moot.

I. Background

Plaintiff Lovie Wells, an African-American, was employed by Lee County as Director of the Division of Equal Opportunity ("DEO") from 1982 until November of 1994. The primary function of the DEO is to ensure the enforcement and investigate violations of federal, state and local equal opportunity laws. In November of 1994, Plaintiff was discharged from his position as Director of the DEO. He was given no explanation for his discharge. Shortly thereafter, Plaintiff filed suit against Lee County, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (et. seq.), claiming that he was fired because of his race and in retaliation for his complaints regarding alleged violations of anti-discrimination law.

A jury trial commenced in this Court on March 16, 1998. On March 19, 1998 the jury returned a verdict finding that Defendant had not discriminated against Plaintiff based on his race but that it had terminated Plaintiff's employment in retaliation for his opposition to employment practices made unlawful by Title VII. The jury awarded Plaintiff $125,255.33 in backpay and $100,000 in emotional damages.

The question of frontpay was not submitted to the jury, the parties having agreed that the Court decide this issue. On March 23, 1998 the Court heard evidence from both sides

regarding the feasibility of Plaintiff's reinstatement to his former position or the amount of frontpay, if any, he was entitled to. Subsequent to this hearing, Plaintiff withdrew his request for reinstatement to his former position with Lee County contending that the evidence proved such a remedy infeasible.

II. Discussion

A. Judgment as a Matter of Law

Defendant moves the Court, pursuant to Fed. R. Civ. P. 50(b), for judgment as a matter of law in its favor on Plaintiff's retaliation claim. Defendant contends that Plaintiff failed to present a prima facie case of retaliatory discharge under Title VII because no evidence of protected expression was adduced at trial.

Judgment as a matter of law under Rule 50 of the Federal Rules of Civil Procedure is properly granted when the evidence, viewed in the light most favorable to the nonmoving party, is insufficient to permit a reasonable juror to find in that party's favor. *F.D.I.C. v. Stahl*, 89 F.3d 1510, 1513 (11th Cir. 1996). In deciding such a motion the Court must defer to the jury on credibility determinations and reasonable inferences made. *Olmsted v. Taco Bell Corp.*, 141 F.3d 1457, 1460 (11th Cir. 1998). Additionally, the Court itself may not weigh the credibility of witnesses nor may it consider the weight of the evidence. *Walls v. Button Gwinnett Bancorp, Inc.*, 1 F.3d 1198, 1200 (11th Cir. 1993). Consequently, judgment as a matter of law may not be granted unless there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair

minded people could not arrive at a contrary verdict. *Carter v. City of Miami*, 870 F.2d 578, 581 (11th Cir. 1989).

42 U.S.C. § 2000e-3(a), commonly referred to as the anti-retaliation provision of Title VII, makes it "an unlawful employment practice for an employer to discriminate against any of [its] employees . . . because he has opposed any practice made an unlawful employment practice under," Title VII. To establish a prima facie case of retaliation under the statute a plaintiff must show: 1) that he engaged in a statutorily protected expression, 2) that an adverse employment action was taken, and 3) a causal link between the adverse action and the protected expression. *Raney v. Vinson Guard Service, Inc.*, 120 F.3d 1192, 1196 (11th Cir. 1997). Protected expression can take the form of either formal or informal complaints of employment discrimination. *Goldsmith v. City of Atmore*, 996 F.2d 1155, 1163 (11th Cir. 1993). Moreover, a plaintiff need not show that the conduct complained of amounted to an actual violation of Title VII, rather he need only show a good faith belief that an unlawful employment practice existed. *Harper v. Blockbuster Entertainment Corp.*, 139 F.3d 1385, 1387 (11th Cir. 1998); *Little v. United Technologies*, 103 F.3d 956, 960 (11th Cir. 1997).

Because Plaintiff in this action has failed to adduce any evidence showing that he engaged in protected expression under Title VII, no reasonable juror could arrive at a verdict for Plaintiff on his claim of retaliatory discharge, and thus, Defendant's motion for judgment as a matter of law is granted. The anti-retaliation provision of Title VII is designed to protect those employees who complain of treatment that violates Title VII or participate in Title VII proceedings from

being subject to adverse employment action for such complaints or participation. *See Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1187 (11th Cir. 1997). Plaintiff in the instant case, however, failed to demonstrate that he ever complained in any way to his employer of any acts that he believed were a violation of Title VII or that he was discharged in retaliation for his participation in a Title VII proceeding.

Much of the testimony at trial centered on Plaintiff's success or lack thereof in implementing county initiatives, his timeliness in submitting reports to superiors, his management skills, and his disagreement with Defendant's decision to cease enforcement of federal fair housing complaints. The evidence showed that Plaintiff was particularly unhappy with the County's decision to abandon fair housing investigations and he demonstrated this unhappiness through direct complaints to his superiors as well as through a letter to the office of Housing and Urban Development ("HUD"), which somehow found its way into a local newspaper. The evidence also showed that Plaintiff's supervisors were not pleased with Plaintiff's complaints and were bothered by what they perceived as his making their disagreement public. Indeed, as the evidence presented at trial suggested, the appearance of Plaintiff's letter to HUD in the newspaper may have been a motivating factor in his employer's decision to discharge him.

However, even if Plaintiff had proven this to be true, it was irrelevant given the particular federal statute upon which he chose to base his complaint. Title VII's anti-retaliation provision provides no relief to an employee for retaliation based upon complaints concerning anything other than conduct prohibited by Title VII itself, i.e., employment

discrimination. There was no evidence presented at trial nor was Plaintiff able to present any plausible interpretation of such in his opposition to Defendant's motion to suggest that he made any complaints of employment discrimination at any time to his employer. Accordingly, no reasonable juror could find for Plaintiff on his claim of retaliatory discharge for opposition to unlawful employment practices under Title VII.

42 U.S.C. § 2000e-3(a) also prohibits an employer from taking adverse action against an employee because he has, "made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under," Title VII. While it was part of Plaintiff's job to investigate and assist in the enforcement of employment discrimination complaints in Lee County, Plaintiff did not pursue a theory that his participation in employment discrimination proceedings was the basis for his discharge. No specific anecdotal evidence was presented at trial regarding such participation by Plaintiff nor was there any evidence to establish a causal link between such participation by Plaintiff and Defendant's decision to terminate his employment. Thus, no reasonable juror could find for plaintiff on his claim of retaliatory discharge for participating in a proceeding or investigation under Title VII. Accordingly, Defendant's motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b) on Plaintiff's claim of retaliatory discharge is granted.

B. Motion for a New Trial

Defendant moves, in the alternative, for a new trial pursuant Fed. R. Civ. P. 59. Where a court grants a party's motion for judgment as a matter of law, it must also rule on

that party's alternative motion for a new trial. Fed. R. Civ. P. 50(c). A motion for a new trial may be granted only when the jury verdict is against the great weight of the evidence. *United States v. Sullivan*, 1 F.3d 1191, 1196 (11th Cir. 1993) (citing *Hewitt v. B.F. Goodrich Co.*, 732 F.2d 1554, 1556 (11th Cir. 1984)).

For the same reasons cited above concerning Defendant's motion for judgment as a matter of law, the Court determines that the jury verdict on Plaintiff's retaliation claim to be against the great weight of the evidence. Accordingly, Defendant's motion for a new trial is conditionally granted in the event that the decision granting judgment as a matter of law is overturned.

III. Conclusion

The Court grants Defendant's motion for judgment as a matter of law on Plaintiff's claim of retaliatory discharge under Title VII of the Civil Rights Act of 1964. The Court also determines that Defendant has met the standard for a new trial pursuant to Fed. R. Civ. P. 59. Plaintiff's motions for entry of judgment on the jury award, prejudgment interest and frontpay are denied. Defendant's motion to remit the jury award as excessive is denied as moot.

So Ordered.

s/ [illegible]
Senior U.S.D.J.

DATED: Manchester, VT
October 1, 1998

APPENDIX C — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED FEBRUARY 24, 2000

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 98-3578-II

LOVIE L. WELLS, JR.,

Plaintiff-Appellant,

versus

LEE COUNTY, a political subdivision of the State of Florida,

Defendant-Appellee.

On Appeal from the United States District Court for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion _____, 11th Cir., 19__, __ F.2d __).

BEFORE: TJOFLAT and CARNES, Circuit Judges, and RONEY, Senior Circuit Judge.

Appendix C

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
JUN 26 2000
CLERK

(2)

No. 99-1899

IN THE

Supreme Court of the United States

LOVIE L. WELLS, JR.,

Petitioner,

v.

LEE COUNTY, FLORIDA, a political subdivision of the State of Florida,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT OF FACTS

To address misstatements of fact in the Petition, Lee County submits the following statement of facts:

The Lee County Division of Equal Opportunity (DEO) is an internal department of Lee County, Florida. Its existence is not required under Florida Law, Title VII, or any other federal law. Petitioner was employed as the Director of DEO. This division was charged with, among other things, enforcing employment discrimination claims by both county employees and non-employees, administering the Disadvantaged Business Enterprise (DBE) Program, which encouraged minority participation contract opportunities with Lee County and, investigating claims under the federal Fair Housing law. Plaintiff failed to prove that he opposed an employment practice made unlawful under Title VII.

The assertion in the Petition of a "continuing indirect but systematic attempt to force Mr. Wells to reduce, if not outright cease, the Title functions of his Division" is contrary to the facts in the record. Not only did Lee County increase DEO's budget and staff, Petitioner admitted his supervisors directed him to continue efforts on employment enforcement. Petitioner further admitted he was never directed to re-establish DEO's priorities so less time and effort would be spent on equal opportunity enforcement.

The record clearly establishes that there were several conflicts between Petitioner and Lee County. Petitioner's mismanagement of DEO, his failure to adhere to time deadlines, and refusal to follow his supervisors' direction to improve the office's failing morale were among them. However, the final area of conflict arose when Petitioner

resisted leading a new effort to recruit minorities for Lee County's workforce at the expense of deferring Fair Housing complaints to the federal agency. Petitioner's opposition to the deferral of Fair Housing complaints to an appropriate federal agency was open and discordant.

The only matter which Petitioner offered evidence at trial that he opposed Lee County on was the deferral of Fair Housing complaints. Petitioner never asserted that his job description alone constituted "opposition" under Title VII. Petitioner failed to prove that he was discharged in retaliation for participating in a Title VII proceeding. Moreover, Petitioner did not pursue a claim that his job description constituted protected activity under the Participation Clause and there is no evidence to establish a causal link between his job description and his discharge. The record establishes that the first mention by Petitioner that he was pursuing a theory that his job status was protected expression was in his post-trial brief in opposition to Lee County's Motion for Judgment Notwithstanding the Verdict.

REASONS FOR DENYING THE WRIT

The relevant portion of Title VII, codified at § 42 U.S.C. 2000e-3(a) states:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, of hearing under this subchapter.

1. Petitioner Failed to Prove a Case of Retaliatory Discharge

A. Petitioner did not oppose an unlawful employment practice

An essential element in a retaliatory discharge claim under the opposition clause of Title VII is opposition to an unlawful employment practice. The record establishes that Petitioner opposed the deferral of Fair Housing complaints from Lee County to the appropriate federal agency. The subject Petitioner opposed, the deferral of fair housing complaints, is not an unlawful employment practice under Title VII. There is no evidence Petitioner was discharged because of his job description. Moreover, Lee County could have disbanded its DEO, as it is not required to have a DEO under Title VII or any other law. But, Lee County did not disband the DEO. It hired a new director of DEO after Petitioner was discharged to continue the DEO's functions. The problem was not with the job function, but with the individual employed to fulfill the job function.

B. There is no evidence that Petitioner's discharge was causally related to his participation in any Title VII proceeding

Petitioner did not pursue a theory that his participation in employment discrimination proceedings was the basis for his discharge. There was no evidence presented at trial regarding such participation by Petitioner and Lee County's decision to discharge him. Nor was there any evidence to establish a causal link between any such participation and his discharge. Of course, Petitioner did not raise the theory that his job function alone constituted "participation" until

his response to Lee County's Motion for Judgment Notwithstanding the Verdict. Thus, having raised the issue for the first time after trial, the jury could not have considered and decided this issue.

CONCLUSION

Petitioner presented no evidence that his participation in any Title VII proceeding was the basis for his discharge. Petitioner did not present a theory that his job function constituted "participation" in a Title VII proceeding until after trial. The posture of this case does not warrant the Count entertaining Petitioner's question.

Respectfully submitted,

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